

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBIN L. SIMMS)	
Claimant)	
VS.)	
)	Docket No. 1,055,096
WAL-MART)	
Respondent)	
AND)	
)	
INS. CO. OF STATE OF PENNSYLVANIA & ILLINOIS NATIONAL INSURANCE CO.)	
Insurance Carriers)	

ORDER

Claimant requests review of the November 18, 2011 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for medical treatment.

The claimant requests review of whether she suffered an accidental injury arising out of and in the course of her employment from repetitive work duties in March 2011 and through her last day worked on March 26, 2011. Claimant argues that the ALJ erred in relying on the causation opinion of Dr. Barrett, contending that Dr. Barrett did not fully understand or follow the law covering aggravations of preexisting conditions.

Respondent argues that the Board lacks the jurisdiction over this appeal as the ALJ's Order denied claimant's request for additional medical treatment, an issue not reviewable by the Board at this stage under K.S.A. 44-534a. However, if the Board finds there is jurisdiction, respondent contends that the ALJ's Order should be affirmed as the medical evidence does not support a finding that claimant suffered personal injury by accident on the dates alleged.

FINDINGS OF FACT

Claimant began working for respondent on May 27, 1997. She is still employed by respondent, but is currently on FMLA.¹ Claimant claims repetitive injury to her low back arising out of and in the course of her employment on three occasions, August 7, 2009, October 7, 2009 and culminating in new symptoms in March 2011 through her last day worked on March 26, 2011. For preliminary hearing purposes, respondent did not dispute the August 2009 and October 2009 injuries, but contends that the medical evidence indicates the March 2011 symptoms were due to a preexisting condition. Respondent would not admit to that date of accident.²

Claimant first strained her low back while lifting boxes on August 7, 2009. Claimant then suffered an accident on October 7, 2009 when she began to loose feeling in her right leg after repetitively sitting and standing at work. She received authorized treatment for the August 2009 strain from Dr. Mark Dobyns, and was released and returned to work with no impairment. Claimant required little medical treatment for the October 2009 strain.

Claimant met with her personal physician Dr. Carol Nibert in March 2010, complaining of intermittent back pain. By June 2010, Dr. Nibert noted claimant's back pain had completely resolved.

Claimant reported in March 2011, that the pain in her low back began to radiate down into her legs into three of her toes.³ Claimant attributes this pain to loading and unloading trucks that she performed in the course of her employment with respondent.

Claimant testified that on her last day of work she tried to work, but had to leave early because she couldn't walk. She ended up going to the hospital because she couldn't take the pain anymore and now she can't walk without taking medication.

Claimant met with Dr. John Estivo, at respondent's request, for an examination on May 10, 2011. Claimant presented with complaints of back pain, right leg pain and numbness and tingling in the right foot. Dr. Estivo opined that claimant had preexisting degenerative disk disease in the lumbar spine with bulging disks at L3-4 and L4-5, and a lumbar strain. Dr. Estivo found that claimant's work injury in March 2011, was a temporary aggravation of her preexisting condition. He opined that the lumbar strain had completely resolved as of November 17, 2009. He did not feel that the claimant was in need of any additional medical treatment. He found claimant to be at maximum medical improvement

¹ Claimant has been on FMLA since April 4, 2011.

² P.H. Trans. at 4.

³ *Id.* at 13.

and assigned a 0 percent impairment. Dr. Estivo recommended claimant pursue treatment for her degenerative disk disease through her private insurance.

Claimant began treatment for her pain with Dr. Sandra Barrett, of the Kansas Orthopedic Center, on her own in June 2011. Dr. Barrett diagnosed pain into the buttocks and into the right lower extremity, with numbness and tingling into the right lateral toes. Claimant was referred for an MRI and EMG/Nerve conduction tests of the right lower extremity. The recent MRI, when compared to an MRI from 11-9-09, displayed progression of degenerative changes at L3-4 and L4-5. The spine at L5-S1 was read as being normal.

Claimant was authorized by the ALJ to have an IME with Dr. Barrett on September 14, 2011. Claimant's chief complaint at the time was low back pain with radiation into the right lower extremity. Claimant reported that although she has a history of back and leg pain from her two prior accidents, the pain in her toes and inability to ambulate was a new symptom and began in March 2011.

Dr. Barrett examined the claimant and diagnosed lumbar radiculopathy, lumbar facet arthropathy, lumbar degenerative disc disease and lumbar stenosis. Dr. Barrett attributed those diagnoses to claimant's prior injuries on August 7, 2009 and October 7, 2009. She considered claimant's current symptoms to be a temporary aggravation of those prior injuries.

An MRI from August 2, 2011, indicated a small posterior central disc herniation with moderate facet arthrosis producing central canal stenosis at L5-S1. There was displacement noted on the descending right S1 nerve root. Dr. Barrett noted the findings at L5-S1 to be recent.

Dr. Barrett found claimant to be at maximum medical improvement (MMI) and assigned a 0 percent impairment. She felt claimant may benefit from medication and injections. She did not assign any restrictions.

Claimant met with Dr. George Fluter, at the request of her attorney, for an examination on June 29, 2011. Claimant presented with preexisting back and leg pain. Dr. Fluter diagnosed claimant with status post work-related injury, August 2009 and October 2009, low back and right leg pain, probable right lower extremity radiculitis, exacerbation/aggravation of back/right leg pain, probable sacroiliac joint dysfunction and probable trochanteric bursitis. Dr. Fluter opined that there was a causal relationship between these conditions and claimant's reported injuries occurring in August 2009 and October 2009. Dr. Fluter recommended medication and therapy for the claimant.

Dr. Fluter assigned temporary restrictions of no lifting, carrying, pushing, or pulling more than 20 pounds, occasionally 10 pounds and frequently 10 pounds, occasionally bend, stoop, crouch or twist, occasionally squat, kneel, crawl or climb, allow to change position periodically for comfort, restrict standing and walking to 20 minutes every hour. Dr.

Fluter's report of June 29, 2011, does not provide a causation opinion on claimant's recent pain complaints from March 2011.

Claimant has worked for respondent for about 14 1/2 years and is currently an inactive employee. She admits to a prior injury to her back in the 90's when she reached for something on the carpet and her back went out. She met with a sports therapist for a month and her conditioned resolved.

Claimant testified that she doesn't know what caused the pain in her back in March 2011, but ultimately attributed it to her work for respondent. She testified that the more she stood, the more she would hurt. And that this pain was different from the pain she had with her other incidents mostly because the pain radiated down her right leg into 3 toes on her right foot.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

⁴ K.S.A. 44-501 and K.S.A. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 44-501(a).

injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁷

Claimant contends that the ALJ erred in determining that she did not suffer personal injury by accident through a series of traumas in March 2011. However, a review of the Order of November 18, 2011, does not support claimant’s contentions. The ALJ found that neither Dr. Estivo, nor Dr. Fluter addressed the allegations of micro-traumas in March 2011. Their comments are limited to the injury accidents occurring in August and October 2009. However, in his history, Dr. Estivo discussed claimant’s allegations of pain, numbness and tingling in her right lower extremity, to her foot. He opined in his report of May 10, 2011, that claimant’s current symptoms are related to her pre-existing degenerative disc disease and that claimant may have a temporary strain to her lumbar spine in relation to the August 7, 2009 accident.

Dr. Fluter’s history likewise contained information regarding an increase in claimant’s symptoms in March 2011. He also found a connection between claimant’s current symptoms and the injuries suffered in August and October 2009. His report does not address micro trauma injuries in 2011.

The only medical opinions which directly address the March 2011 micro-trauma injury allegations are those of Dr. Barrett and Dr. Estivo. Dr. Barrett’s medical report addresses claimant’s need for ongoing medical treatment, finding claimant to be at MMI with no permanent functional impairment. Dr. Estivo found the March 2011 conditions to be a temporary aggravation of claimant’s preexisting accidental injuries in 2009, for which claimant was at MMI. The ALJ then went on to deny claimant’s request for additional medical treatment. There is nothing in the Order which contradicts claimant’s contention that she suffered personal injury by accident which arose out of and in the course of her employment with respondent in March 2011. Only that she is not entitled to medical treatment at this time.

Respondent contends that claimant has failed to prove that she suffered personal injury by accident through a series of micro traumas in March 2011. However, the medical evidence supports a finding that, while claimant is not in need of ongoing medical care for those injuries, she did sustain her burden of proving, for temporary purposes, that her previous injuries from 2009, were, at least temporarily, aggravated. The decision of the ALJ will not be disturbed on that issue at this time.

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant’s request for temporary total disability and ongoing medical treatment at a

⁷ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁸

The Board does not take jurisdiction of disputes regarding ongoing medical treatment on appeal from a preliminary hearing order. The ALJ did not exceed his jurisdiction in denying claimant ongoing medical treatment and the Board will not further review his decision to do so.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that the ALJ exceeded his jurisdiction in denying ongoing medical treatment for the series of traumatic injuries which claimant suffered in March 2011. The Board does not take jurisdiction of this issue at this time. This Board Member affirms the implied finding by the ALJ that claimant suffered at least a temporary aggravation of her prior injuries in March 2011.

⁸ K.S.A. 44-534a (a) (2).

⁹ K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated November 18, 2011, remains in full force and effect and the appeal of claimant with regard to the denial of additional medical treatment is dismissed. The ALJ's implied finding that claimant suffered at least a temporary aggravation of her prior low back condition in March 2011 is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge